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SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

No. 361

OSCAR POFE,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable Chief Justice and Associate Justices Of The Supreme Court Of The United States:

Petitioner, Oscar Pofe, petitions for the issuance of a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit which affirmed the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, dismissing his suit and entering a Summary Judgment for respondent on its counterclaim.

A STATEMENT OF THE MATTER INVOLVED.

Petitioner, Oscar Pofe, a general agent of respondent, The Continental Insurance Company of New York, sued for $12,365.56 which he claimed to be due him under an agreement whereby respondent was to pay him the same rate that it was paying to its other "general" agents. He received $40,124.42 in commission during the five year period ending September 1, 1940 upon the representation that this was the rate it was paying to its other general agents, which representation was false and fraudulent, as it paid its other general agents 10% in excess of the rate which it paid him, and under such rate he would have been entitled to $52,489.98 up to that period, upon the mutual running account and, therefore, he sued for the $12,365.56 difference, and excluded other matters under the special agreement subsequent to that date.

The answer of the respondent denied that it ever made the agreement, but did not deny that it did not make the representations. In its counterclaim it asserted that there was due it from the petitioner $2654.74 for matters that occurred subsequent to September 1, 1940, which liability petitioner conceded and reduced by payment to $2400.00.

Respondent moved below for a judgment under Rule 12 (c) based on the pleadings and under Rule 56, based on extrinsic evidence to dismiss the action and for a judgment on the counterclaim. Petitioner opposed the motions and filed a counter-affidavit setting forth therein that his claim which exceeded the counterclaim was for matters which were embraced under the agreement which was in force up to September 1st, 1940 and while he admitted the liability on the counterclaim the respondent was still indebted to him the amount sued for in excess of respondent's counterclaim.

The Trial Court dismissed the suit of the petitioner, and entered judgment on the counterclaim for $2400.00, without indicating whether the judgment was entered on the pleadings or on the summary judgment which was based on extrinsic evidence.

The Court of Appeals affirmed the judgment below and denied a rehearing on the ground that the admissions of the liability on the counterclaim eliminated petitioner's action.

THE QUESTIONS PRESENTED.

The following questions are presented in this Petition:

1. Whether the judgment dismissing the action for a sum in excess of the counterclaim and entering the judgment on the counterclaim was proper under Rules 12 (c), 15 (b), 54 and 56.

2. Whether it is proper to enter judgment under alternative motions based on Rule 12(c) and Rule 56, without disposing of one of the alternatives, and without indicating whether the judgment was under Rule 12(c) or Rule 56.

3. Whether the admission of the liability on the counterclaim extinguished the claim in petitioner's suit which exceeded the counterclaim so as not to leave any genuine issues of fact to be tried, notwithstanding the existence of issues of facts as made up by the pleadings.

4. Whether the counterclaim was compulsory and if so, whether an admission of an indebtedness on such a counterclaim operates *ipso facto* to extinguish the suit in excess of the counterclaim.

5. Whether the facts alleged in the opposition affidavit to the summary judgment were at variance with the pleadings, and even if so, whether it was the duty of the court to consider the pleading as amended under Rule 15(b) and not to render final judgment.

REASONS FOR GRANTING OF WRIT.

1. The Petition presents important questions of procedure requiring an interpretation of the Federal Rules of Civil Procedure. The question whether an admission of liability on a counterclaim extinguishes the action of the plaintiff which exceeds the counterclaim, particularly where the action excluded the matters embraced in the counterclaim, as to authorize a dismissal of the action and and the entry of judgment on the counterclaim on alternative motions under Rules 12 and 56, deserves the consideration of this Court and the exercise of its discretionary power to grant the Writ.

2. The decision that where a party presents alternative motions under Rules 12(c) and 56 that judgment may be rendered without deciding on which of the two alternatives the judgment is based, leaving the aggrieved party in the dark on what the judgment is based and placing the burden on him to argue in the reviewing Court both motions, is an unreasonable construction of the new Federal Rules and in the interest of due administration it is necessary to have an expression of this Court on this important matter in Federal procedure.

3. The affirmance of the judgment of the District Court on the ground that the facts stated in the opposition affidavit which would have otherwise not justified the summary judgment was "a belated attempt to overcome the effects of the admission" in the "pleading", was based on a misconception of the aim, purpose, and scope of summary judgments. Neither the trial Court nor the reviewing Court may disregard the facts because of alleged variance with pleadings. Its decision is not only in conflict with decisions of other circuits, but is also in conflict with its own decision, and the Writ should be granted to harmonize the decisions.

4. The questions presented by this Petition were never passed upon by this Court and the Writ should be issued in order to harmonize the conflicting views of the Courts and to settle important questions of procedure under the new Federal Rules.

SPECIFICATIONS OF ERRORS RELIED ON FOR REVERSAL.

1. The admission of the indebtedness on the counterclaim which was less than the amount claimed by the plaintiff, did not warrant the entry of the judgment dismissing plaintiff's action and entering judgment for the respondent on its counterclaim. It was the duty of the court to permit the plaintiff to try his cause of action and to deduct from the amount established by the plaintiff the amount admitted to be due on the counterclaim, and the entry of the judgments dismissing plaintiff's action and granting a summary judgment on the counterclaim was clearly erroneous as a matter of law.

2. The motion for judgments on the pleadings admitted every fact pleaded in plaintiff's complaint and the falsity of denials in defendant's Answer, and, therefore, the court erred in entering judgment on the pleadings.

3. The entry of the judgment dismissing plaintiff's complaint and granting a judgment on the counterclaim was clearly erroneous in view of the opposition affidavit filed by the plaintiff and in view of defendant's admissions of the truth of the allegations by its motions.

4. The court of Appeals clearly erred in affirming the judgment under Rule 12(c) and 56 and it was its duty to reverse the judgment rendered and to direct a trial on the merits.

PRAYER FOR RELIEF.

Wherefore, Petitioner prays that this Court grant a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to the end that its judgment be reversed with directions to reverse the judgments of the District Court of the United States for the Northern District of Illinois, Eastern Division, and that the cause proceed to trial on the merits.

Oscar Pofe, Petitioner,
MEYER ABRAMS,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

No.

OSCAR POFE,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction Invoked.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit sustaining the judgment below was rendered on June 4, 1947, and the rehearing was denied on June 30, 1947. The petition is, therefore, filed timely, and the jurisdiction of this Court is invoked under Judicial Code, Section 240(a), 28 U. S. C. A., Section 347 (a) as amended by the act of February 13, 1925.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R-48-53) is officially reported (161 F. (a) 912).

STATEMENT OF THE CASE.

The Pleadings.

The original suit was filed in the Municipal Court of Chicago on December 13, 1943 and was removed by the respondent to the Federal Court on July 20, 1944 and after the removal, petitioner filed his Amended Complaint at law.

The Complaint:

After alleging the jurisdictional requirements (R 3; ¶1) the complaint alleged (R. 3; ¶2) that plaintiff entered into a written agreement with the defendant on December 31, 1927 by the terms of which the defendant agreed to pay plaintiff commission for his services rendered pursuant to the terms of said contract at "the same rate at which defendant was paying its other general agents." On October 22, 1937 the terms of the contract were modified by a written agreement (R. 3; ¶3). This agreement contained modifications of the original agreement, except as to the payment of the commission, stating in paragraph 1: "Agent has full power * * * to retain out of premiums so collected, as full compensation on business so placed with the company, commissions at the following rates, viz.: As now or may be in the future mutually agreed upon". Plaintiff acted as the "general agent" under the contract (R. 4; ¶4) and performed his services until September 1st, 1940. He was paid by the defendant (¶ 6) certain commissions upon the fraudulent representation of the defendant that the rates of commission upon which it paid him were the rates which it was paying its other general agents (R. 4; ¶7), and shortly prior to the filing of the complaint he ascertained that the defendant was paying its other general agents 10% additional com-

mission, and (¶ 8) by reason thereof, there was due to him $12,365.56 for the additional 10%.

The complaint alleged (R. 4; ¶4) that this contract was in force until September 1, 1940 and did not relate to transactions performed "thereafter". Plaintiff only received as a result of the concealment of the real rate $40,124.42, while there was really due him $52,489.98 upon the mutual running account up to September 1, 1940 (R. 5; ¶8) and there was due him $12,365.56 (R. 5; ¶9).

The Answer:

The Answer denied (R. 8; ¶ 2) that plaintiff was the general agent, and asserted that he was only one of its agents. It denied that there was any agreement to pay the plaintiff the rates it was paying other general agents. It admitted, however, (R. 9; ¶4) that subsequent to the termination of the agency of the plaintiff on September 1, 1940 plaintiff continued to act as defendant's agent as to "automobile" and "inland marine" insurance. The Answer was silent on the question whether or not the other general agents received the 10% above the amount that was paid to the plaintiff.

The Counterclaim:

Defendant's counterclaim alleged (R. 12) that during the employment of plaintiff he procured a large number of insurance policies and made monthly current statements from which he deducted his commissions; that (R. 13) the current statements attached as exhibits to the counterclaim show that there was due it from the plaintiff for the period from January, 1942 to May 27, 1946, $2,654.72. The accounts appear in the two exhibits attached to the counter-

claim, one of the exhibits being dated May 27, 1946 wherein plaintiff wrote to the defendant that he was enclosing a check for $100 and there was a balance due it of $2,654.72 (R. 17).

The Reply:

Counter-defendant's reply to the counterclaim (R. 17) denied that after September 3, 1940, when his agency terminated, he represented the company only as to inland marine and automobile insurance, but alleges that he retained a large number of class 2 agents, on which policies counter-defendant was paid an over-riding commission of 10% plus 10% contingent commision, and that such policies covered all lines of insurance which cleared through plaintiff's office. He admitted the indebtedness on the counterclaim of $2,654.72.

The Motions:

The defendant and counterclaimant moved for judgments on the "pleadings" and for "summary judgments" (Tr. 18). The ground for these motions was that it appeared from the Complaint that plaintiff's claim was based on commissions relating to the insurance business; that the counterclaim alleged that there was due on the counterclaim $2,654.72, which was admitted to be due by the counter-defendant; that it appears from an affidavit (R. 21) that this $2,654.72 was reduced by payment of $254.72 and that on August 20, 1946 there was due to the counterclaimant the sum of $2,400.

The Opposition:

The plaintiff filed an affidavit which by error stated it was in "support" of the motion for the judgments, but

which was in fact an affidavit in *opposition* thereto. In this affidavit the plaintiff alleges (R. 26) that the defendant and counterclaimant agreed to pay him a sum and rate equal to and as high as any of its other agents of the same class as the plaintiff; that when he received his commissions, he presumed that the rates paid to the other agents were the same as the rate which he deducted from the commissions and which he received from the defendant; that based upon this assumption, and before he knew of the fact that different rates were paid, he recognized a balance due to the defendant on the basis of the established rate; that at the date when he recognized the liability on the balance in 1942, he executed a deed conveying certain property as security for the purpose of securing the balance due to the defendant and counterplaintiff; that the defendant thereafter refused to release this property until he paid the balance of the indebtedness which he previously recognized; that the plaintiff thereafter reduced the balance in the amount stated by payments which were made during, and subsequent, to the filing of the suit and not prior thereto.

The Judgment:

While the defendant and counterclaimant prayed judgments on the "pleadings" under Rule 12(c) and in the alternative, "summary judgments" supported by affidavits under Rule 56, the court entered a judgment (R. 27) dismissing plaintiff's cause of action and entering a judgment on the counterclaim in the amount of $2,400 without indicating whether it was under Rule 12(c) or Rule 56.

The Affirmance:

The Court of Appeals affirmed the judgment below (R. 48) on the ground that the counterclaim was "compulsory" and the admission of the liability on the counterclaim extinguished petitioner's claim which was in excess of the counterclaim. It sustained the judgment, notwithstanding the fact that a genuine issue was raised by petitioner's affidavit, on the theory that the issues of fact raised by his opposition affidavit were in conflict with his "pleading", and the court denied rehearing.

ARGUMENT.

I.

When a suit exceeds the amount of the counterclaim the court is without power to dismiss the suit and enter judgment on the counterclaim, and it is its duty to permit a trial on the merits and to deduct the amount due on the counterclaim from the amount due plaintiff.

Assuming *arguendo* that it was proper to enter judgment on a motion for a judgment on the pleading under Rule 12(c) and for a summary judgment on extrinsic evidence under Rule 56, without indicating the foundation for the judgment and disposing of one of the two alternatives, it was nevertheless improper to enter the judgment, and the decision affirming it is in conflict with decisions of other Circuits and is based on erroneous interpretations of the Federal Rules of Civil Procedure.

The foundation of the motions is based on a *false* conception that the admission by plaintiff that he was indebted $2,400 on the counterclaim constituted an admission that there was nothing due him. This is *clearly an error of law*. This question was squarely decided *adversely* in *Crompton* v. *Seaich*, 142 App. Div. 432. There, the court said (p. 433):

> "A counterclaim when *admitted* will *not* entitle the defendant to a judgment for the full amount thereof, *unless the plaintiff fails to establish his cause of* action, and he can only recover the excess over the plaintiff's recovery where the plaintiff succeeds as to any part of his claim. The plaintiff by omitting to reply to a counterclaim, only admits that every ma-

terial allegation constituting it 'shall, for the purposes of the action, be taken as true.' *The effect of that admission is that the amount so counterclaimed may be deducted from the plaintiff's claim,* but it by no means concedes that the defendant shall be entitled to the recovery of the entire sum, irrespective of the demand made by the complaint."

The decision is cited with approval in *Burgess* v. *Slaven,* 266 N. Y. S. 79, 81. To the same effect is the decision in *Moore* v. *Wright,* 4 Ill. App. 443, where the court said at page 449:

"On the trial below the plaintiff admitted that he was owing the defendant upon account, and the proof sufficiently establishes the amount due, and the court should have allowed the defendant his demand against the plaintiff, *to the extent it was established* by the evidence and *if the plaintiff failed to show a right of recovery upon his alleged cause of action,* the defendant should have had a judgment for the full amount of his counterclaims." (Emphasis ours.)

In 57 Corpus Juris, page 522, Section 189, the author says:

"A counterclaim, when admitted, will not entitle defendant to a judgment for the full amount thereof, *unless plaintiff fails to establish his cause of action,* and it has been held that he can only recover the excess over plaintiff's recovery where plaintiff succeeds as to some part of his claim * * *. Where defendant admitted plaintiff's claim, *a judgment awarding defendant the whole amount of his counterclaim, without deducting plaintiff's claim therefrom is erroneous.*" (Emphasis ours.)

The author cites many authorities sustaining this statement of the law, which is the *universal law.* The new Federal Rules did not change the law. The "notion" that the "counterclaim relief" must "defeat" the opponent's relief "never had currency in Federal procedure" and Rule

13(c) makes it clear that this is not the function of a counterclaim (*Abraham* v. *Selig*, 29 F. Supp. 59; *Parmalee* v. *Chicago Eye Shield Co.*, 157 F. (2d) 582, 587).

The opinion (161 F. (2) 912) states (R. 51) that it "might agree" with petitioner's contentions that there "were genuine issues of fact" were it not for his answer to the counterclaim which admitted the allegations that he rendered monthly accounts and that he owed $2,654, which admissions were (R. 52) "utterly incompatible" with the allegations of the "original complaint". The court *conceded* that even an "account stated" may *not* be "final" and is "open to correction" because of "mistakes or fraud," but "no attempt was made to impeach" here until "the filing of the affidavit in opposition to the motion for judgment" which was "after the closing of the pleadings" and it "assumed" that the affidavit "was a belated attempt to overcome the effect of the admissions of the answer to the counterclaim." It *overlooked* that the *alleged account stated* is based upon transactions which occurred subsequent to September 1, 1940, which transactions were *excluded* from the complaint, and only *prior* transactions were involved on the ground of *fraud.*

The exhibits that are attached to the counterclaim show that the balance of $2654.72 was made up (R. 14) of two items: (1) of $776.09, and (2) of $1978.63. The exhibit further shows (R. 16) that the item of $776.09 was based on debits from January 1942 to July 1942 and on credits (with the exception of an item of $2.86) commencing June, 1942 and ending November, 1942. The item of $1978.63 (R. 16) comprises debits and credits from January, 1942 to February, 1943. Plaintiff's suit *excluded* all of the items upon which the alleged accounting is based, which had no relation to the subject matter of the suit.

In his complaint the plaintiff stated that it *was based on matters which transpired until* September 1, 1940, and not on matters that transpired thereafter, *which did not relate to the cause of action* (R. 4; ¶4). The accounts upon which the action was based were (R. 5; ¶8) from January 1, 1935 to September 1, 1940, *and after deducting the credits and debits as of that date,* plaintiff claimed that there was due him under his cause of action $12,365.56. He stated in his complaint (R. 4; ¶7) that while the credits and debits were correct as to the items between January 1, 1935 to September 1, 1940, it was based on *concealment of material facts and fraud* and he based his complaint on fraud and he sued for 10% for the items covered by these transactions, *excluding the subsequent items.*

The Reply to the counterclaim denied that the transactions after September 1, 1940 involved the same matters that were covered by the complaint up to September 1, 1940 and specifically stated (R. 17) that the matters *prior* to September, 1940 involved *different* transactions from the ones involved *after* September, 1940 and admitted the correctness of the account for the *period not covered by the complaint.* The affidavit in opposition to the summary judgment was, therefore, *not* a "belated attempt to overcome the effects of the admissions", as the court erroneously "assumed", but coincided *with the theory of the complaint and with the admissions to the counterclaim.* And if there was a variance, it was the duty of the trial court and of the Court of Appeals *to treat the pleading amended* and not enter a final judgment, under Rule 15(b) and Rule 54 as construed by the Second Circuit (*Downy* v. *Palmer,* 114 F. (2) 116, 117) and the decision is squarely in conflict with that of the Second Circuit.

II.

The decision is in conflict with decisions of other Circuits.

The opinion 161 F. (2) 912 *concedes* (R. 51) that the facts as stated in the opposition affidavit would have constituted genuine issues of fact were it not for the alleged conflict with the "pleading" which admitted the liability on the counterclaim, and *held that the pleading was controlling.* This is in conflict with Rule 15(b) as construed by the same circuit in *Globe Liquor Co.* v. *Roman,* 160 F. (2) 800 where the court said (p. 802):

> "Of course, where on the trial evidence is admitted without objection which proves a case different from that alleged in the complaint, we may consider the pleading amended to conform to the evidence thus introduced."

And is also in conflict with the decision of the Second Circuit in *Rossiter* v. *Vogel,* 134 F. (2) 908, 912 that "where facts offered in affidavits upon motion for a summary judgment which would justify an amendment of the pleadings" *no summary judgment should be entered.*

Statements in opposition affidavits against the summary judgments must be treated in the same degree as if evidence were introduced at the trial without objections, and where there is a discrepancy between extrinsic evidence and the pleadings the *former must prevail* under Rule 54. This is particularly true in a case where there was no trial on the merits and where the person is deprived of his day in court (*Sprague* v. *Vogt,* 150 F. (2) 795). The rules for *summary judgments* were not adopted to entrap parties, and if a lawyer inadvertently made admissions in pleadings which perhaps he would not have made if he were more careful, and thereafter filed an affidavit in opposition to a motion for summary judgment, *the affidavit should be given effect and the pleadings considered*

amended, as this court held in the *Globe* case *supra*. It was the duty of the trial court, as well as the duty of the reviewing court, to consider the plaintiff's pleadings and his opposition statements in the most *favorable light* to him (*Ramsouer* v. *Midland Valley R. Co.*, 135 F. (2) 101, 105); and *resolve every doubt against the movant* (*Parmelee* v. *Chicago Eye Shield Co.*, 157 F. (2) 582) and even if there be discrepancies between pleadings and affidavits, it should not assume, as it did in this case, that the discrepancies were "*belated attempts to overcome the pleadings.*" Such presumption should *not* be indulged in support of a summary judgment against them.

The opinion refers to the authorities cited by the petitioner (R. 52, Note 1) and distinguished them on the ground that the counterclaims in those cases were based "on subject matter in no way related to that of the complaint". The Court overlooked that in the instant case the *counterclaim in no way related to the subject matter embraced in the complaint*. The complaint was based on transactions that occurred up to and including September 1, 1940 and expressly excluded subsequent matters which were not the foundation for the claim (R. 4, ¶4). The counterclaim was based on matters that transpired commencing with the year 1942 and which had no relation to plaintiff's claim under an agreement which expired September 1st, 1940. There was *no inconsistency* between the admission of the liability on the counterclaim and the amount claimed by the plaintiff in his claim. The "mutual account", *up to September* 1, 1940 was based on the representation of the respondent as to what were the rates it paid to other general agents during that period. *This mutual account was not disputed* by the petitioner but the claim was based on *fraud and misrepresentation* as to the payment under which he was entitled to 10% *addi-*

tional commission. This had nothing to do with the counterclaim which embraced matters that were not in dispute. It is obvious that the distinctions of the Court are inapplicable, and the decision is *clearly in conflict* with the decision in *Parmelee* v. *Chicago Eye Shield Co.*, 157 F. (2) 582. It is also in conflict with the decision of the Sixth Circuit in *Rogers* v. *Guardian Trust Co.*, (Feb. 7, 1947) 159 F. (2) 239, 242.

III.

The motion for a judgment on the pleadings admitted the truth of every allegation of the complaint and the falsity of the denials in the answer.

It is elementary that a motion by a defendant for a judgment in his favor on the pleadings *admits the truth of every* factual allegation in the Complaint, and the denials of the facts in the answer cannot be considered (*Art Metal Construction Co.* v. *Lehigh*, 116 F. (2) 57). No extraneous matters may be considered on a motion for a judgment on the pleadings. The affidavit filed by the defendant in this case cannot be considered in connection with its motion for a *judgment on the pleadings* and the court may only look to the Complaint and *not* to the Answer (*Ream* v. *Callahan*, 42 F. Supp. 951; *Snowwhite* v. *Tidewater Oil Co.*, 40 F. Supp. 739; *Friedman* v. *Washburn Co.*, 145 F. (2) 751, C. C. A. 7).

The motion of the defendant for "judgment on the pleadings" admitted the *truth* of all of plaintiff's allegations and *conceded* the *falsity* of defendant's denials (*Wyman* v. *Wyman*, 109 F. (2) 473). We will, therefore, only discuss the cause of action as alleged in the Complaint, which facts are conceded to be true by the motion for the judgment on the pleadings.

The conceded facts are that defendant entered into an agreement with the plaintiff on December 31, 1927 by the terms of which plaintiff was to act as its "general" agent for all insurance business and agreed to pay him the same rate which it was paying to all of its other general agents (Tr. 3: ¶2). The contract was modified on October 22, 1937 as per written agreement attached to the Complaint, and plaintiff performed his services as defendant's general agent under the terms of the contract up to September 1, 1940, except as to certain other matters which remained in full force and effect thereafter (Tr. 4: ¶¶ 3, 4, and 5). Plaintiff was paid 25% of the gross premiums on "ordinary" business, 35% on "preferred" business and 10% of "accrued net profits" at the end of each calendar year. The defendant "fraudulently" and with "intent to deceive" the plaintiff, *wilfully misrepresented* to him that the aforesaid rates of commission, which he received, were the highest rates which defendant was paying to its general agents standing in the same agency relation as the plaintiff was, but in truth and in fact *the defendant was paying other agents an additional* 10% *commission*, which fact *first* became known to the plaintiff on or about June 1, 1943 and that plaintiff is entitled on the additional 10% for the period up to September 1, 1940 the sum of $12,356.56. This indebtedness constituted a part of a "mutual account" between the parties and the suit was brought within 5 years from the date when the said indebtedness became finally due and owing.

On the state of these admitted facts, there could be no judgment on the pleadings for the defendant. Having *admitted* that it made a contract and agreed to pay the plaintiff the same rate as it paid its other general agents and that when it paid the plaintiff his commission it *fraudulently concealed* from him that it paid other agents an additional 10% commission, that these facts were not

known to the plaintiff until June 1, 1943 and that the amount due him was $12,365.56, it follows that there could be no judgment on the pleadings for the defendant. In view of the admission of the liability to the plaintiff in excess of $12,000, there could be no judgment on the pleadings on the counterclaim for $2,400. All that the plaintiff was entitled to was to *deduct* the $2,400 which was admitted to be due it from the $12,365.56, the amount claimed by the plaintiff. The judgments on the pleadings dismissing plaintiff's cause of action and entering judgmest on the counterclaim *cannot be sustained on any theory* and should be reversed.

IV.

The motion for summary judgment was improperly sustained when it appeared that there were genuine issues of fact to be tried.

A movant is not entitled to a summary judgment unless the conceded facts show *beyond any doubt* that the plaintiff is not entitled to any relief (*McEllwain* v. *Wickwire Spencer Steel*, 126 F. (2) 210; *Miller* v. *Miller*, 122 F. (2) 209, 212). The court which decided this case in construing Rule 56 of the Federal Rules of Civil Procedure in (*Campana* v. *Harrison*, 135 F. (2) 334), said:

> "The purpose of Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following sections 723c was to enable the court to enter summary judgment when the pleadings and affidavits that may have been filed with the pleadings, clearly showed that there was no issue of fact to be tried. *The court in such proceedings is not permitted to try on the affidavits submitted an issue of fact which is presented by the pleadings.* In the case at bar, the Corporation alleged in its complaint that it bore the burden of the tax and that its dealings with the Sales Com-

> pany were at arm's length. The Commissioner in his answer denied these allegations. This presented sharp, clear issues of fact. Affidavits were filed to prove and to disprove these issues of fact, and the court on these conflicting affidavits undertook to resolve the conflict. *This action of the court was not proper on the motion for summary judgment.* The affidavits did not demonstrate that there were no issues of fact; They demonstrated that there were decided issues of fact. The Commissioner could not be foreclosed on the right to a trial on those issues by the entry of summary judgment. *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 3 Cir., 130 F. 2d 1016; *Heiberg* v. *Halser*, D. C., E. D. N. Y., 1 F. R. D. 735." (Emphasis ours.)

A summary judgment cannot be entered if there be any issue of fact sustaining the claim of the adversary (*Sartor* v. *Arkansas Natural Gas Co.*, 321 U. S. 620).

In *Parmelee* v. *Chicago Eye Shield Co.*, 157 F. (2) 582 the court pointed out that a summary judgment cannot be entered where there are genuine issues of fact. The "burden" is on the "movant" to show an absence of issues of fact and *all doubt must be resolved against the movant.*

In *Doehler Metal Furniture Co.* v. *United States*, 149 F. (2) 130, the court said at page 135:

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. *A litigant has a right to a trial where there is the slightest doubt as to the facts*, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time-saving device. But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. *Denial of a trial on disputed facts is worse than delay. Cf. Arenas* v. *United States*, 322 U. S. 419, 429,

433, 64 S. Ct. 1090, 88 L. Ed. 1363. The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered. *Sartor* v. *Arkansas Natural Gas Corporation*, 321 U. S. 620, 624, 64 S. Ct. 724, 88 L. Ed. 967, tells us that, especially where, as here, damages are in question, the courts should go slow about making haste by a summary judgment; there the Supreme Court said that 'at least a summary disposition of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party' "

See also *Rogers* v. *Guardian Trust Co.*, 159 F. 239.

We have already shown that Petitioner's claim is based on 10% commisison due him for services performed *up to September* 1, 1940, excluding services performed by him after that date (R. 4; ¶ 4). The "other dealings" between the plaintiff and the defendant, which were not embraced in the claim upon which the suit was predicated, appear from defendant's answer which *admits* (R. 9; ¶4) that plaintiff *continued* for a time after September 1, 1940 to act as agent of the defendant as to "automobile" and "inland marine" insurance. Plaintiff's claim was not based upon such service but on services performed *prior* to September 1, 1940.

It appears from the exhibits (R. 15, 16) that this was for *special services* performed between January, 1942 and February, 1943 and these items were *expressly excluded* from the Complaint, which was limited to September 1, 1940.

The affidavit of Earl B. Vickery states that plaintiff was appointed by the defendant as defendant's agent to procure insurance business for the defendant for "fire" and allied lines of insurance at rates of commission fixed by oral arrangements in accordance with the rules of the

Chicago Board of Underwriters and that the rates of commission were agreed upon between the plaintiff and defendant at 35% upon preferred risks, 30% upon intermediate risks, and 25% upon ordinary risks and that the credits and debits were computed according to such rates (R. 22, 23). He stated that according to the contract or agreement between them plaintiff was required to render defendant current monthly accounts and that plaintiff was entitled to a "term of credit" upon these accounts and that he became delinquent in remitting the balances so that on or about September 30, 1942 there was due from the plaintiff to the defendant in excess of $6,000, which account was later reduced to $2,400, and that the payments on account of these items were made by the plaintiff *subsequent* to the filing of the suit and during its pendency and that there is due to the counter-plaintiff on an account stated the item of $2,400 (R. 25).

Plaintiff filed a counter-affidavit which alleged that the agreement of the defendant was to pay him "a sum and rate equal to and as high as any of the other agents of the same class as the plaintiff." Plaintiff presumed that the rate that he had been receiving was the same rate that other agents received until he discovered the facts that higher rates were paid "as alleged in the Complaint." Before he became aware of these facts, he conveyed, in 1942, his real estate to the defendant as security for a balance due *figured on the rate which the plaintiff was being paid, without knowing then that he was entitled to a higher payment,* and that after he filed his lawsuit claiming the amount due him from the defendant, he was desirous to obtain the release of his property because of the enhanced market value of properties in the years 1945 and 1946 and the defendant insisted on the payment of the balance before it would release the

real estate, and that he, therefore, made the payment during the pendency of the suit in order to obtain the release of the real estate (R. 26, 27).

The following *genuine issues of fact appear* therefore, from the record: (1) whether the plaintiff was the general agent of the defendant as alleged in the complaint; (2) whether he was an ordinary agent as asserted in the answer; (3) whether plaintiff and defendant agreed that the plaintiff would receive the same rate as was being paid to the other general agents as asserted in the complaint (R. 3) and as denied in the answer (R. 8); (4) whether other general agents received higher rates as alleged in the complaint (R. 4) and on which the answer is silent which, according to the Federal Rules must be considered as an admission of the truth of the allegation; and (5) whether the payment was made upon the stated account as claimed by the defendant (R. 25) or whether it was paid on the account which was agreed upon *before* plaintiff discovered that there was due him in excess of $12,000 under his agreement by the concealment of the facts as alleged in his complaint (R. 10) which facts were adopted by the opposing affidavit (R. 26). Upon such a state of the record which shows *genuine issues of* fact it was *clearly erroneous* to grant the summary judgments.

There were conflicting statements in the complaint and the answers, as well as in the affidavit of defendant and in the affidavit of the plaintiff. *In such a case no summary judgment can be entered without at least findings of facts* (*Bauer* v. *Rose,* 149 F. (2) 612, 616). No such findings were made here. According to this court no summary judgment may be entered at all (*Campana* v. *Harrison,* 135 F. (2) 334, *supra*).

The sufficiency of the pleadings are not open to attack on a motion for a summary judgment. The affidavit in support of the judgment did not deny the allegations of fraud upon which petitioner's claims are founded, and even if it did, the affidavit could not have been considered as the motion admitted the truth of the allegations. (*Rogers* v. *Guardian Trust Co.*, 159 F. (2) 239, 241).

V.

Rule 12(c) and Rule 56 are mutually exclusive and a judgment cannot be entered on both motions without disposing of one of the motions. The entry of a summary judgment without indicating on which motion it is based, is improper under a reasonable construction of these rules.

Rule 12(c) is based on the "pleadings" while Rule 56 is based on "extrinsic evidence". There is no contention on the part of the petitioner that a party may not move alternately for a judgment under both rules. Our contention is that a reasonable construction of these rules would require the Court to *deny one of the motions* and to at least indicate the foundation for the judgment. A party is entitled to know the foundation for the judgment which is entered against him so that in the event of an appeal he need not grope in the dark and be compelled to devote his efforts in *discussing two motions* which are mutually exclusive, as the petitioner was compelled in this case. If the court had indicated that the judgment was based under Rule 56 then there would have been no need to burden the reviewing court and to devote time to a discussion of the motion under Rule 12 (c), and the same thing would be true if the court had indicated that the motion was based on the pleadings and not on the extrinsic evidence. The purposes of the rules was to simplify procedure and not to make it more

cumbersome. The purpose of a summary judgment is not to entrap the parties and if a person is not entitled to a judgment on the pleading or is entitled to a summary judgment on the extrinsic evidence, the proper judgment should be entered so that the aggrieved party may know what steps to take in the event of a review.

The opinion relies (R. 53) on the decision in *Palmer* v. *Palmer,* 31 F. Supp. 861. In a note on page 863 the court points out that there is "some difference" of opinion on the point whether the distinctions should be kept in mind. There is, however, no difference in opinion on the point that the judgment should point out whether it is based under Rule 12(c) or under Rule 56. At any rate, there is no ruling on this point by this court.

Conclusion.

The decision below is not in harmony with the decisions of other circuits, and is unsound. The petitioner was deprived of his day in court without the opportunity to try his claim on the merits. The writ should be granted to the end that the judgment below be reversed, and the law affecting procedure under the Federal Rules be clarified.

Respectfully submitted,

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